

SUBSTITUTE ORDINANCE NO. 5551

AN ORDINANCE AUTHORIZING THE ISSUANCE OF CONTRACTUAL LICENSES, PERMITS AND/OR AUTHORIZATIONS FOR USE AND OCCUPATION OF THE STREETS, ALLEYS, THOROUGHFARES AND RIGHTS-OF-WAY OF THE CITY OF MEMPHIS FOR INSTALLATION AND USE OF FACILITIES FOR THE OPERATION OF FIBER OPTIC AND OTHER COMMUNICATIONS SYSTEMS AND PUBLIC UTILITIES AND ESTABLISHING REQUIREMENTS, TERMS, CONDITIONS, LIMITATIONS AND PROVISIONS FOR RECOVERY OF THE CITY'S COSTS INCURRED FOR THE CONSTRUCTION, MAINTENANCE, POLICING, MANAGEMENT OR REPAIR OF THE STREETS, ALLEYS, THOROUGHFARES AND RIGHTS-OF-WAY OF THE CITY

WHEREAS, it is proper under Tennessee law that permission to use the public rights-of-way for communications systems and public utilities be sought and obtained from the City by public and private utilities and telecommunications providers under authority of Section 15 of Ordinance No. 1852, the Home Rule Charter of the City of Memphis and Section 3 of Chapter 11 of the Acts of 1879, which is preserved by Section 17 of the City's Home Rule Charter, and from all of which authority the City is made the proprietor of its streets and public rights of way in trust for its citizens; and

WHEREAS, the Council desires to adopt a new ordinance that governs access, use and occupation of its streets and public rights of way by public and private utilities and telecommunications providers;

WHEREAS, the Council desires to formally repeal all ordinances and compensation schemes based on a percentage of gross revenues or other methods of compensation, whether set by ordinance or administrative directive, and to adopt uniform provisions that specify conditions and requirements for access, use and occupation of its streets and public rights of way by public and private utilities and telecommunications providers, including methods and procedures for setting rates and fees based on that portion of the City's right of way costs reasonably related to regulating specific activities or defraying

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the cost of providing services or benefit to such public and private utilities and telecommunications providers;

WHEREAS, the Council recognizes that the new ordinance it desires to adopt to govern access, use and occupation of its streets and public rights of ways as undergone substantial revision over the course of consideration by the Council since it was first introduced and the Council desires to allow the public and private utilities and telecommunications providers further opportunity to continue to review and provide suggested revisions to the engineering and operational provisions of the ordinance over the next sixty days following final adoption and will consider such further revisions at the end of such sixty day period.

NOW, THEREFORE, BE IT ENACTED AND ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS, AS FOLLOWS:

Article I. DECLARATION OF AUTHORITY.

The City of Memphis has been delegated, as proprietor, the entire control over the streets, alleys, thoroughfares and rights-of-way located within its corporate limits by the General Assembly pursuant to Chapter 11 of the Acts of 1879 and subsequent Acts, all of which were preserved by Section 17 of the City's Home Rule Charter. In addition the City possesses police powers to regulate the use of its streets, alleys, thoroughfares, rights-of-way and public places for the protection of the health, safety and welfare of its citizens. The City acts in its proprietary capacity by enacting this Ordinance and by authorizing the Mayor to issue any authorization, license, permit or easement issued or made pursuant to this ordinance or to enter into any contracts pursuant thereto and as such intends to be bound by the provisions of this Ordinance and any Authorization, license, contract, permit or easement issued or made pursuant to this Authorization ordinance as a natural person, except when its duty and obligation to protect the health, safety and welfare of its citizens requires that it act contrary to the express provisions

of this Ordinance or any resulting Authorization, license, contract, permit or easement issued or made pursuant to this ordinance, since the abrogation or waiver of its police powers by contract or otherwise is contrary to the laws and public policy of this State. Upon adoption of this Ordinance, the Mayor and those acting at his direction are hereby authorized, empowered and directed to implement the provisions of this Ordinance and to take any and all other steps they deem necessary or appropriate to implement this Ordinance and any Authorization, license, contract, permit or easement issued or made pursuant to this Ordinance.

The Council reserves its authority to grant franchises in its legislative discretion pursuant to Section 17 of the City's Home Rule Charter and this ordinance is not intended to supplant or govern the exercise of that authority by the Council.

This Ordinance is not intended to govern the approval or authorization for access to the City's rights of way by any entity, person or joint venture providing or seeking to provide cable or video service over a cable system or video service network facility in the City, which shall be governed by Title VI of the Communications Act of 1934, compiled in 47 U.S.C. § 521 et seq., Tennessee Code Annotated § 7-59-304, et seq. and/or by Section 17 of the City's Home Rule Charter ("Cable Provider"), which presently includes Comcast Cable. The Council exercise of its lawful with respect to any Cable Provider shall be set forth in a separate ordinance or franchise agreement.

The City's Public Utility, MLGW, shall not be required to obtain a franchise or other general grant of authority hereunder to occupy the City's streets and rights of way; its construction activities in the City's streets and rights of way shall be governed by a separate ordinance to be adopted by the City Council, which ordinance shall be non-discriminatory as to telephone and telegraph companies to the extent required by applicable law.

Article II. Statement of Policy.

(a) Any person or corporation organized by virtue of the laws of this State, or of any other State of the United States, or by virtue of the laws of the United States, for the purpose of transmitting intelligence by magnetic telegraph or telephone, or other system of transmitting intelligence or the equivalent thereof, which may be hereafter invented or discovered, is authorized, under Tennessee and federal statutes, to construct, operate and maintain a telegraph, telephone, or other lines necessary for the speedy transmission of intelligence, along and over the public highways and streets of the cities and towns of this State, subject to all reasonable police powers of the City to regulate the construction, maintenance, or operation of such line within its limits, including the right to exact reasonable rentals and compensation for the use of its streets on a non-discriminatory and competitively neutral basis.

(b) It is the policy of the City of Memphis to maintain the integrity, operational safety and functions of the City's streets and rights-of-way, including accommodating access to the City's streets and rights-of-way by Telecommunications Companies for the installation of their Telecommunications Systems. It is also the policy of the City of Memphis to grant non-exclusive franchises, licenses, authorizations and permits, on a competitively neutral and non-discriminatory basis, allowing the installation of underground Telecommunications Systems and related facilities within the rights-of-way of the City; provided, however, that any such access, use and/or occupation of the City's streets and rights-of-way by Telecommunications Companies with their Telecommunications Systems shall be subject to this Ordinance and conditioned on the payment of compensation by such Telecommunication Companies using and occupying the City's rights-of-way with their Telecommunications Systems in such amounts determined by the City Council from time to time in accordance with applicable law. The City may, at its option, accept monetary compensation or in-kind compensation, or both. Valuation of in-kind compensation shall be calculated in accordance with the method of valuation adopted by the Council.

Article III. Governing Law.

It is the intent of the Council that this Ordinance and any agreement made under the authority of this Ordinance be governed by and interpreted in accordance with Tennessee law, including but not limited to Tennessee Code Annotated, Sections 65-21-101, -103 and -201 and the applicable provisions of the Federal Telecommunications Act of 1996, 47 U.S.C. § 253, as construed by the United States Court of Appeals for the Sixth Circuit and by Tennessee appellate courts.

Article IV. Definitions.

For the purpose of this Ordinance the following definitions shall apply:

3.01 "Anniversary Date" shall mean each anniversary of the date on which any contract under this Ordinance is fully executed.

3.02 "Cable or Video Services Provider" shall mean any entity, person or joint venture authorized to provide cable or video service over a cable system or video service network facility in the City, pursuant to Title VI of the Communications Act of 1934, compiled in 47 U.S.C. § 521 et seq., and possessing a franchise issued under Tennessee Code Annotated § 7-59-304, *et seq.* and/or under Section 17 of the City's Home Rule Charter.

3.03 "Charter" shall mean collectively (i) Ordinance No. 1852, Home Rule Charter adopted by Referendum vote on November 8, 1966 (the "Home Rule Charter") and (ii) the Charter of the City of Memphis as enacted in Acts 1879 as amended, to the extent not repealed by the Home Rule Charter.

3.04 "City" shall mean the City of Memphis.

3.05 "City Engineer" shall mean the position of City Engineer created by the Charter or a successor position, or an acting City Engineer or the designee of the City Engineer.

3.06 **"Contract Year"** means with respect to any payments due the City under this Authorization Ordinance, each twelve (12) month period during the term of any Authorization, license, contract, permit or easement issued or made pursuant to this Authorization ordinance.

3.07 **"Confidential Information"** shall mean any Trade Secrets (as defined below) or other information relating to a Grantee that derives economic value from not being generally known to or readily accessible to other persons and is the subject of reasonable efforts to maintain its secrecy. Confidential Information shall include, but not be limited to, (i) a Grantee's manner of operation, forms of agreements, plans, processes and programs; (ii) information about its finances and financial condition and about the finances and financial condition of clients or other entities affiliated with a Grantee; (iii) research, marketing plans, designs, procedures, formulas, discoveries, inventions, concepts, ideas, specifications, flowcharts, listings of customers, supplies, or analyses; and (iv) information supplied to Grantee by other parties which a Grantee is obligated to keep confidential. As used herein, "Trade Secrets: shall include any technical or non-technical data or information, design, procedure or improvement that derives economic value, actual or potential, from not being generally known to or readily ascertainable by proper means by the competitors of a Grantee. "Confidential Information" shall not include any information which has entered the public domain.

3.08 **"Council"** shall mean the Council of The City of Memphis.

3.09 **"Day"** or **"Days"** shall mean a calendar day or days.

3.10 **"Director of Finance"** shall mean the position of Director of Finance and Administration created pursuant to and under the Charter or a successor position, or an acting Director of Finance, or the designee of the Director of Finance.

3.11 **"FCC"** shall mean the Federal Communications Commission, or any successor agency.

3.12 **"Authorization"** shall mean the non-exclusive contractual privilege, authorization license or easement granted as provided in this ordinance to occupy or use the streets and/or public rights-of-

way within the City for the construction, operation and maintenance of any Public Works or any fiber optic and/or other telecommunications systems within all or a portion of the City.

3.13 **"Right of Way Agreement"** shall mean a fully executed and notarized Authorization, license, contract, permit or easement issued or made pursuant to this Authorization ordinance by and between the City and Grantee in form and substance agreeable to the City, wherein the City grants certain non-exclusive revocable rights to use and occupy its streets and rights-of-way and wherein Grantee accepts and agrees to be bound by the terms and provisions of this ordinance.

3.13 **"Grantee"** shall mean any public or private utility or any company operating Public Works, utility systems or telecommunications systems using facilities either constructed, owned or leased within the Public Right-of-Way for any purpose.

3.14 **"Public Right-of-Way"** shall mean real property surface, subsurface and air rights (appurtenant to surface rights) acquired by the City by any lawful means and devoted to transportation of people, goods or information and to the provision of governmental services and includes the surface and that area below the surface which is necessary to support the public street, alley, path, bridge, tunnel, sidewalk, planting strip, median, waterway, dock, wharf, pier, public ground, utility easement or other public right-of-way. Public right-of-way also includes the surface of any public street, alley, public ground or other public right-of-way acquired by the City. No reference herein or in any Authorization for use of any public right-of-way shall be deemed to be a representation or guarantee by the City that its title to any public right-of-way or any improvement or object located therein is sufficient to permit or authorize its use by the Grantee. Public Right-of-Way shall not include any real or personal property, buildings, infrastructure, such as sewers, conduits, poles and bridges, owned by the City that is not a utility, easement or right-of-way.

3.15 **"Public Works"** shall mean any water, gas or electric heat, light or power works, plants and systems as defined in Tennessee Code Annotated § 7-34-102 and any such systems owned and operated by privately owned utility companies.

3.16 **"Public Right of Way Administrator"** shall mean who shall be a person designated by the Mayor within the Office of the City's Chief Administrative Officer, whose responsibility shall be to coordinate with all divisions of City government having any responsibility for managing, supervising or inspecting any construction or use of the City's Public Rights of Way by private or public entities.

3.17 **"Public Utility"** shall mean any utility that is municipally owned and operated and which operates any water, gas or electric heat, light or power works, plants and systems as defined in Tennessee Code Annotated § 7-34-102.

3.18 **"System" or "Telecommunications System"** shall mean Grantee's Fiber Optic Facilities and any network of cables, wires, lines, conduits, innerducts, wave guides, optic fiber, microwave, laser beams, and any associated converters, equipment, or facilities that are placed in, on, across or over the public rights-of-way that are designed and constructed for the purpose of producing, receiving, amplifying or distributing by audio, video or other forms of electronic signals to or from subscribers or locations within the City.

3.19 **"TRA"** shall mean the Tennessee Regulatory Authority or any successor agency.

3.20 **"Telecommunications Act of 1996" or "TCA 1996"** shall mean and refer to 47 U.S.C. §§ 251, 252 and 253.

3.21 **"Conduit"** means a hollow tube, duct or tabular runaway (of varying sizes) used to enclose and protect innerducts, fiber optic wires, cable or other wires for underground installation of such innerducts, fiber optic wires, cable or other wires.

3.22 **“Innerduct”** means a hollow, flexible tube (of varying sizes) used to enclose fiber optic wires, cables or other wires for underground installation, and which may be enclosed within conduit.

3.23 **“Telecommunications Company”** means any cooperative, corporation, partnership or individual named in the Right of Way Agreement that may locate, install or maintain fiber optic cable facilities within the City’s rights-of-way.

3.24 **“Term”** means the duration of the Right of Way Agreement under which a telecommunications company locates, installs and maintains Telecommunications System within the rights-of-way of state freeways.

3.25 **“Fiber Optic Facilities”** means underground fiber optic conduit, ducts, cable lines, wires or related facilities.

3.26 **“Cover”**. Depth of Lop of pipe, conduit, casing or gallery below grade of roadway, ditch or other utility facilities.

3.27 **“Direct Burial.”** Installing Fiber Optic Facilities underground without encasement.

3.28 **“Encasement.”** Structural element surrounding a pipe.

3.29 **“Encroachment.”** Unauthorized use of the City’s streets and rights-of-way or easements for signs, fences, utilities, parking, storage, etc.

3.30 **“Gallery”**. An underpass for two or more utility lines.

3.31 **“Manhole”**. An opening in an underground system which workmen or others may enter for the purposes of making installations, inspections, repairs, connections and tests.

3.32 **“Median”**. The portion of a divided highway or street separating the Traveled Ways for

traffic in opposite directions.

3.33 **“New Utility Installation.”** An initial installation on the City’s streets and rights-of-way and the replacement of existing facilities with those of a different type, capacity or design of replacement at a new location on the right-of-way.

3.34 **“Normal.”** Crossing at a right angle.

3.35 **“Oblique”.** Crossing at an acute angle.

3.36 **“Pavement structure”.** The combination of subbase, base course, and surface course placed on a subgrade to support the traffic load and distribute it to the roadbed.

3.37 **“Pipe”.** A tabular product made as a production item for sale as such. Cylinders formed from plate in the course of the fabrication of auxiliary equipment are not pipe as defined here.

3.38 **“Plowing”.** Direct burial of utility lines by means of a “plow” type mechanism which breaks the ground, places the utility line and closes the break in the ground in a single operation.

3.39 **“Private lines”.** Privately owned facilities which convey or transmit intelligence or information but are devoted exclusively to private use.

3.40 **“Roadside”.** A general term denoting the area adjoining the outer edge of the travelled roadway. Extensive areas between the roadways of a divided highway may also be considered roadside.

3.41 **“Roadway.”** The portion of a highway, including shoulders, for vehicular use. A divided street or highway has two or more roadways.

3.42 **“Specifications”.** Standard Specifications for Road and Bridge Construction approved by the City Engineer.

3.43 **“Surety”**. The corporation, partnership or individual other than the utility owner, executing a bond furnished the City by the utility owner.

3.44 **“Traveled Way”**. The portion of the roadway for the movement of vehicles, exclusive of shoulders, auxiliary lanes and rights of way designed for placement of utilities.

3.45 **“Trenched”**. Installed in a narrow open excavation.

3.46 **“Untrenched”**. Installed without breaking ground or pavement surface, such as by jacking or boring.

3.47 **“Utility Owner”**. Any private cooperative, corporation, company or individual named in the Right of Way Agreement and responsible for the construction, operation and maintenance of the telecommunications and utility facilities or private lines.

Article V. Administration

The administration of the access, use and occupation of the City’s Public Right of Way by private and public entities shall be under the supervision of the Chief Administrative Officer of the City. The Mayor shall designate a person within the Office of the City’s Chief Administrative Officer, whose responsibilities shall be:

- 1) To coordinate with all divisions of City government who perform services, functions or activities in all or a portion of the City’s Public Rights of Way;**
- 2) To coordinate with all divisions of City government having any responsibility for managing, supervising or inspecting any construction, use, operation or maintenance of a fiber optic and/or other telecommunications systems within all or a portion of the City’s Public Rights of Way by private or public entities;**
- 3) To manage the application process;**

- 4) *To insure that all requirements, limitations and conditions imposed by this Ordinance and other laws, ordinances, rules and regulations are satisfied before any authorization to access the City's Public Rights of Way is granted;*
- 5) *To insure that all statutes, laws, ordinances, rules and regulations pertaining to the City's Public Rights of Way are observed by Grantees;*
- 6) *To develop a system for preserving, recording and maintaining all contracts, licenses, permits or easements granted under this ordinance to occupy or use the streets and/or Public Rights-of-Way for the construction, operation and maintenance of a fiber optic and/or other telecommunications systems within all or a portion of the City.*

Article VI. Conditions for Access to the City's Rights of Way

(a) No telecommunications company or utility owner shall be permitted to install underground or above ground any Telecommunication System or related facilities within the City's rights-of-way without first obtaining permission from the City by executing a Right of Way Agreement or a permit. No telecommunications company or utility owner shall cause or allow any Telecommunication Systems or related facilities to continue to occupy the City's rights of way after the effective date hereof without obtaining a Right of Way Agreement or other Authorization from the City, except that any such telecommunications company or utility owner shall be permitted to continue to occupy the City's streets and rights of way pursuant to any unexpired Specific Route or Encroachment Agreement as long as any such company is not in default thereunder. This Ordinance shall supercede and replace any unexpired Franchise Agreement governing access and construction activities within the City's Public Rights of Way (non-Resellers' Ordinances).

(b) Upon making application to the Chief Administrative Officer for a Right of Way Agreement under this Ordinance, the telecommunications company shall pay a permit application fee to the City for processing the permit application, reviewing plans, and other administrative services. The total amount of the required application fee shall include a base fee of \$750 plus \$200 for each mile of the proposed installation within all or a portion of the City's Public Rights of Way over the initial two (2) miles of installation. The City Engineer shall determine whether permits shall be required for non-material modifications or repairs to existing systems.

(c) All utility installations within the City's streets and rights-of-way and all work performed within the City's streets and rights-of-way or otherwise, including without limitation any work performed for the City, shall be subject to review and inspection by the City Engineer to insure

conformity with all City engineering and construction standards, which standards shall be deemed a part of the Right of Way Agreement by reference. The inspection fee shall equal \$1.00 per linear foot of the proposed installation within all or a portion of the City's Public Rights of Way. The City engineer shall have the discretion to assign one or more inspectors, either City employees or specially employed engineering contractors, to inspect the installation periodically and if necessary place one or more inspectors on the site for the duration of construction activities depending on availability of staff engineers, the magnitude and the complexity of the utility installations within the City's streets and rights-of-way. Should outside engineering contractors be used for inspection services, the cost of such services shall be paid from the inspection fee with any excess costs to be billed to the Grantee. The necessity and extent of such inspectional services will be determined by the City Engineer on a case by case basis. If the City Engineer and Grantee disagree on the need for inspection services, the cost of an inspection or the results of a City inspection, the City Engineer and Grantee shall meet within ten (10) days to review the issues. The decision of the City Engineer on the necessity for such inspectional services may be appealed to the City's Chief Administrative Officer, whose decision shall be conclusive and final.

(d) The City Engineer shall have the authority to reject substandard work or materials and/or to suspend or stop work, in whole or part, where the telecommunications company fails to comply with any material requirement of this Ordinance or the terms of the Right of Way Agreement related to the work being suspended or stopped or where any unsafe or hazardous condition exists unless and until corrective measures have been made to the satisfaction of the City Engineer. Any such suspension shall relate only to the permitted project and shall not affect any other separate installations.

(e) Any inspection or control exercised by the City over the construction activities of the utility owner shall in no way relieve the utility owner of any duty or responsibility to the general public nor shall such services and/or control by the City relieve the utility owner from any liability for loss, damage or injury to persons or adjacent properties.

(f) All application, review and inspection services performed by City personnel shall be taken into consideration in determining periodic right of way compensation under Article XI of this Ordinance to insure that the costs of performing application, review and inspection services are not duplicated. The decision of the City's Chief Administrative Officer shall be final and conclusive with respect to conditions, terms, stipulations and provisions to be included in any Right of Way Agreement.

Article VII. Right of Way Agreement Requirements

Each Right of Way Agreement for the installation of Telecommunications Systems within City's rights-of-way shall be subject to this Ordinance and specifically, but without limitation, to the following terms and conditions:

(a) Assignment. The telecommunications company and/ or utility owner may not assign or transfer its rights or obligations under the Right of Way Agreement to another telecommunications company or other entity or person that is not under common control of the Grantee without first giving written notice to, and obtaining the consent of, the City, which consent shall not be unreasonably withheld. The word "control" as used herein means actual working control in whatever manner exercised. A rebuttable presumption that a transfer of control has occurred shall arise upon the disposal by the Grantee, directly or indirectly, by gift, assignment, voluntary sale, merger, consolidation or otherwise, of ownership interest in Grantee to an unaffiliated party or person which results in a material change of the composition of its

Board of Directors and Executive Level Management. Except that no consent shall be required for any sale, transfer, or assignment of ownership, control or obligations to an entity that Grantee controls, is controlled by, or is under common control with or to any entity which acquires or succeeds to all or substantially all of the business or assets of Grantee whether by consolidation, merger, sale or otherwise, or in connection with a financing transaction, provided that at least thirty (30) days prior to such transfer or change of control, Grantee provides written notice to the City of such transfer.

(b) Indemnification and Hold Harmless.

- 1) ***The telecommunications company and/ or utility owner shall indemnify the City of Memphis and their officers, employees and agents, and hold them harmless to the maximum extent allowed under Tennessee law for any and all claims arising from the telecommunications company's use of the City's right-of-way to install, operate and/or maintain Telecommunications Systems, including claims by third parties, and including attorneys' fees and all other costs of preparing for and defending against such claims, regardless of any negligence or fault of the City of Memphis in the design, construction and maintenance of the rights of way.***
- 2) ***Without limiting the foregoing, the telecommunications company shall hold the City of Memphis, and their officers, employees and agents, harmless, to the maximum extent allowed under Tennessee law, for any personal injury or property damage, including interruption of service or loss of business, incurred by the telecommunications company, or its officers, employees or agents, arising from the City of Memphis' construction, reconstruction, operation or maintenance of the City's right-of-way, regardless of any negligence or fault of the City of Memphis in the design, construction and maintenance of the rights of way.***

3) *The City agrees to give Grantee prompt and reasonable notice of any claims or lawsuits; and Grantee shall have the right to investigate, compromise, intervene and defend same to the extent of its own interest. Notwithstanding any provision of this Article to the contrary, the above indemnification shall not apply to any judgment or liability resulting from the gross negligence or willful misconduct of the City. The terms and provisions contained in this Section are intended to be for the benefit of the City and Grantee, and are not intended to be for the benefit of any third party. The City shall have the right to participate or conduct the defense of its interests in any proceeding, and thereby assume risks and liabilities for its own acts or omissions.*

(c) Insurance. The telecommunications company shall at all times have and maintain, and upon the request of the City shall provide written proof of liability insurance policies containing, at a minimum, the following insurance coverage:

- 1) *All such liability insurance policies shall provide liability coverage sufficient, at a minimum, to match the City limits of liability under City Ordinances. These limits are currently set at One Million Dollars (\$1,000,000.00) combined single limit, bodily injury and for real property damage in any one occurrence and Five Million Dollars (\$5,000,000.00) aggregate.*
- 2) *Grantee shall also file with the City a certificate of insurance for a comprehensive automobile liability insurance policy written by a company authorized to do business in the State of Tennessee, for all owned, non-owned, hired and leased vehicles operated by Grantee, with limits no less than One Million Dollars (\$1,000,000.00) each accident, single limit, bodily injury and property damage combined, or evidence of self-insurance.*
- 3) *Grantee shall also maintain and specifically agrees that it will maintain throughout the term of the Authorization, workers compensation and employers liability, valid in the State, in the minimum amount of the statutory limit for workers compensation.*

- 4) *All liability insurance required pursuant to this section shall be kept in full force and effect by Grantee during the term of any Right of Way Agreement or other Authorization and until after the removal of all poles, wires, cables, underground conduits, manholes and any other conductors and fixtures installed by Grantee in the Public Rights-of-Way incident to the maintenance and operation of the Telecommunications System as defined in this Ordinance.*
- 5) *All policy limits set forth herein are subject to change by order of the City's Chief Administrative Officer without amendment of this Ordinance.*
- 6) *All such liability certificated of insurance shall name the City of Memphis as an additional insured for the purposes of fulfilling the telecommunications company's obligations under the Use and Occupancy Agreement,. Grantee shall provide the City a minimum of thirty (30) days written notice of the intent to amend or cancel by either Grantee or the insuring company.*

(d) Surety Bond. The telecommunications company or utility owner shall furnish a surety bond, issued by a company licensed to do business in the State of Tennessee, and in such form and amount acceptable to the City, guaranteeing full and faithful performance of the terms and conditions of the Use and Occupancy Agreement, including without limitation the repair and restoration of the right-of-way premises, the payment of any monetary compensation remaining due to the City for use of the City's Streets and rights-of way, and the completion of any installation or relocation of Telecommunications Systems. The City Engineer shall reasonably determine the appropriate amount of the bond to safeguard the interests of the City with regard to damage to public property by considering the size of the project, the amount of future compensation due the City and the estimated cost of removing Grantee's property in the event of a default or failure to relocate Grantee's Telecommunications Systems. The Bond may be reduced by the City Engineer during the term of a Right of Way Agreement upon request of Grantee. Any decision of the City Engineer as to the size of the bond may be appealed to the City's Chief Administrative Officer, whose decisions shall be final.

(e) Relocation or Removal.

- 1) ***If, at any time, the City reasonably determines that any Telecommunications Systems need to be relocated within, or removed from, the City's streets and rights-of-way for any reason related to the use, operation, maintenance, construction, reconstruction, modification or redesign of any such streets and rights-of-way, the telecommunications company or utility owner shall relocate or remove the facilities within 180 days as directed by written notice from the City Engineer. City Engineer shall work with Grantee to identify and designate an alternate location for any impacted facilities and shall work with Grantee to limit any related service disruptions. Such decision to ask Grantee to remove or relocate Grantee's Facilities in order to accommodate the activities of the City***

shall be thoughtfully considered and the City shall use reasonable efforts to avoid repeated impact on Grantee's Facilities.

- 2) All such costs of relocation or removal shall be borne solely by the telecommunications company or utility owner and not by the City, except as the City may otherwise agree in accordance with a special condition of the Right of Way Agreement executed prior to the installation, or as the City may subsequently agree in writing under a utility relocation contract, but only if the State reimburses the City for such relocation expenses or if City requires Grantee to relocate the same facilities on a non-emergency basis more than once in a twenty-four (24) month period.*
- 3) The telecommunications company or utility owner shall complete the relocation or removal within one-hundred eighty (180)days after written notice, or within such additional time as the City Engineer may authorize in writing. Upon the failure of the telecommunications company or utility owner to relocate or remove its Telecommunications Systems within the specified time, or such additional time as the City Engineer may authorize in writing or Grantee is not working diligently to complete the relocation or removal, upon thirty (30) days written notice the Telecommunications Systems shall be deemed to be abandoned by the telecommunications company or utility owner, and the City may hold the telecommunications company or utility company liable for the costs of removing such facilities from the City's streets and rights-of-way.*
- 4) To the extent that the telecommunications company or utility owner is required to remove Telecommunications Systems from the City's streets and rights-of-way, the telecommunications company shall to that extent be relieved of any further obligation under the Right of Way Agreement to compensate the City for the use of the City's streets and rights-of-way. To the extent that the telecommunications company is allowed to relocate Telecommunications Systems to another location within the City's streets and rights-of-way, the telecommunications company or utility owner may elect either to remain under the terms of compensation specified in the Right of Way Agreement, or the telecommunications company or utility owner may choose to enter into a new Right of Way Agreement for the new location.*

(f) Duration and Renewal of Right of Way Agreements.

- 1) Initial Term.** *The Right of Way Agreement for the installation of Telecommunications Systems within the City's streets and rights-of-way shall have an initial term of up to 5 years at the option of the telecommunications company or utility owner, without any necessity of approval from the City Council. For any Telecommunications System that occupies more than twenty (20) lane miles of the City's streets and rights-of-way term may qualify for term of up to twenty (20) years; City Council approval by resolution shall be required for any such systems. Other installations may at their option seek Council approval for terms longer than five (5) years, which approval shall be within the legislative discretion of the Council.*
- 2) Renewal Options.** *Upon the expiration of the initial term of the Right of Way Agreement, the telecommunications company shall have an option to renew the Right of Way Agreement for one (1) additional term of 5 years, or longer term approved by the City Council, but shall be subject to the applicable rate of compensation in effect as of the date of renewal. In no event shall any initial term or any successive renewal term exceed a combined total of 20 years. If, on the expiration date, Grantee shall not be in default under any Authorization, license, contract or permit, such Authorization, license, contract or permit shall be deemed extended on an interim basis until terminated, renewed or renegotiated. Said interim extension period shall not extend beyond a date sixty (60) days after the expiration date.*

Article VIII. Compensation.

(a) Compensation Requirement.

- 1) No telecommunications company or utility owner shall be permitted to install or maintain any Telecommunications System within City's streets and rights-of-way**

except upon the payment of compensation for the use and occupation of such rights-of-way, as adopted by the Memphis City Council from time to time.

- 2) *The City may, at its option, may receive the compensation for use of City's streets and rights-of-way in the form of money or as in-kind compensation in the form of telecommunications facilities or services, or both; provided however the City may only use such facilities or services in the performance of its governmental and public services..*

(b) Rate and Method of Compensation.

- 1) *The rate of monetary compensation shall be as established by the Memphis City Council from time to time by Ordinance for such time periods determined by the Council by affixing an addendum to this Ordinance. In establishing the monetary rate of fair and reasonable compensation for use and occupation of City's streets and rights-of-way, the City Council shall consider the following factors:*
 - i) The City's costs in regulating the right of way activities of telecommunications companies and utility owners,
 - ii) the extent the City's streets and rights-of-way are used and occupied by such companies and owners,
 - iii) the proportionate share of the City's cost of making and keeping in repair and policing the City's streets and rights-of-way to be assigned to such companies and owners in order to defray the total amount of the City's right of way costs to provide right of way services to such companies and owners,
 - iv) the cost of providing the benefit to such companies and owners of the use and occupation of the City's streets and rights-of-way for installation of their telecommunications facilities, including, but not limited to, savings on construction costs due to ease of installation in established rights-of-way conveniently located in close proximity to their customers and businesses, comparable rates charged for the use and access, the amount of right-of-way available in certain locations and demand for certain locations. Information pertaining to these factors shall be presented to the Council by the City administration and

additional information or comments may also be presented to the Council by any other interested parties.

- v) any other factors the Council deems relevant.
- (c) The method of valuation for in-kind compensation and the valuation for the purposes of a Right of Way Agreement shall be as established by the Memphis City Council with input from the City's Chief Information Officer.
- (d) Total Amount of Compensation. The total amount of compensation due for use of the right-of-way for a shall be fixed as of the date of execution of the Use and Occupancy Agreement, in accordance with the rate and method of valuation of in-kind compensation established by the City Council and in effect at that time.
- (e) Unit Measure of Compensation.
 - 1) ***Compensation shall be stated and computed on a measured unit of right of way used by a Telecommunications Company and may be based (i) on the cubic feet of right-of-way such provider occupies in the public right-of-way, including clearance zones required by this Ordinance or by applicable industry and safety standards or (ii) on a unit charge for each linear foot conduit of four inches (4") or less or the equivalent thereof if innerducts containing fiber optic cable are installed without conduit or if fiber optic cable is buried in the right-of-way without a conduit or an innerduct, except that there shall be no charge for any innerduct or fiber optic cable provided to the City as in-kind compensation.***
 - 2) ***The linear foot charge for conduit, innerduct or cable shall be calculated on a pro rata basis. For example, the charge for a five inch conduit or five inches (5") of combined innerducts or cables shall be 1.25 times the charge for a four inch conduit or four inches (4") of combined innerducts or cables.***
 - 3) ***In-Kind Compensation. If the City's Chief Administrative Officer chooses to receive in-kind compensation under a Right of Way Agreement, it shall provide the Telecommunications Company with a list of the specific telecommunications facilities and/or services that it wishes to obtain. If the Telecommunications***

Company agrees to provide such in kind service the value of such in-kind compensation, as determined in accordance with the method of valuation established by the City Council, shall be subtracted from the total amount of monetary compensation due for use of the right-of-way and the remaining balance, if any, shall be remitted as monetary compensation.

Article IX. Policy and Methodology for Monetary Rate Setting.

The Council shall establish monetary compensation that is fair and reasonable considering the City's annual costs that are reasonably related to making the City's streets and rights-of-way available to telecommunications companies and utility owners for the installation of their telecommunications facilities. The rate of monetary compensation established should be within a zone of reasonableness rather than a rate determined with mathematical precision. To this end the City Council adopts the fully allocated cost and incremental cost methodologies to define the upper and lower ranges of aggregate costs to be considered in setting a rate or rates for right of way compensation. The Council finds the discussion and analysis of these economic concepts by the Federal Communications Commission in its rate order governing the FCC's rate making activities in the closely analogous area of just and reasonable cost based pole attachment rates under the Pole Attachment Act, 47 U.S.C. § 224(d) to be instructive even its provisions are not binding on the City. *In the Matter of Implementation of Section 224 of the Act A Nat'l Broadband Plan for Our Future*, 26 F.C.C Rcd. 5240 (Apr. 7, 2011) ("2011 Rate Order"). While the Pole Attachment Act does not apply to municipal governments and municipal utilities, it is instructive of accepted economic methods for determining just and reasonable cost based rates for the use by non-owning telecommunications companies of telephone poles, fiber optic conduit, rights of way and other telecommunication infrastructure owned by investor owned utilities and telephone companies.

Under the FCC's 2011 Rate Order the FCC approved an approach which established a zone of reasonableness for an access fee as that compensation that was based on a facilities owner's costs falling between an "upper bound rate" and a "lower bound rate", the Commission reasoned that such an approach balanced the goals of increased competition with the historical role of proportionate cost recovery to facilities owners and their ratepayers. *Id.* ¶¶ 138-146.

Under the FCC's 2011 Rate Order, it defined the "upper bound rate" as that rate derived from its telecom rate formula applied to a facilities owners' fully allocated costs using a fully allocated cost methodology, which recovers a full range of costs of the facilities owner, such as (i) operational costs related to the pole, conduit or right of way, (ii) capital cost of acquiring the pole, conduit or right of way, and (iii) borrowing costs and depreciation, which is the method presently used by MLGW and other municipal utilities in Tennessee and in other states. *Id.* at ¶142. The FCC defined the "lower bound rate" as "a rate that covers the facilities owners' incremental cost associated with an attachment," which partly incorporates the economic cost causation principles advocated by the telecommunications industry. Under a strict application of cost causation principles, if a customer is causally responsible for the incurrence of a cost, then that customer – the cost causer – pays a rate that covers this cost. Under this theory that is usually espoused by telecommunication providers seeking access to another's facilities, sometimes called the "free rider" theory, there is very little incremental cost caused by the "free rider" since most costs would be incurred by the owner if the "free rider" was not present.

Even though the FCC found some support in economic theory for the application of strict cost causation principles in the lower bound rate the FCC did not follow the incremental cost causation method exactly as advocated by the non-incumbent telecommunication provider industry; rather, it included maintenance and administrative expenses in its calculation of allowable costs under its "lower bound rate", even though the attacher might not be the cost causer with respect to all the operating costs

that might be incurred by a facilities owner, to avoid shifting the full operating cost burden to the owning utility's ratepayers. *Id.* at ¶146.

Cost based rate formulas used by Tennessee Municipal Electric Power Providers, such as MLGW, for access to their poles and telecommunications facilities is one of the most relevant illustrations of a "full cost" allocation model, which more evenly spreads the cost of ownership of the poles or telecommunications facilities among all users, as a 2007 study by the Tennessee Advisory Commission on Intergovernmental Relations found. Under this formula the cost of a facilities owner's telecommunications infrastructure is the initial capital outlay for a telephone pole, fiber optic conduit, rights of way or other telecommunication infrastructure, minus accumulated depreciation. The carrying charge rate is a composite rate that reflects separate carrying charge rates for the costs of owning and maintaining such facilities. *See, e.g., 1987 Rate Order*, 2 FCC Rcd at 4391, para. 25; *2001 Order on Reconsideration*, 16 FCC Rcd. at 12121, ¶ 28. The carrying charges include a facilities owner's administrative, maintenance, interest and depreciation expenses, a return on investment [a factor not applicable here], and taxes.

The Council finds that the reasoning and rationale set forth in the FCC's 2011 Rate Order for defining the range of costs to be considered in setting rates is sound and addresses many of the policy considerations applicable to the City. The Council therefore adopts a rate setting methodology that bases right of way compensation for all relevant time periods on the fully allocated cost of the City on the upper end of a range of reasonableness and the incremental cost of the City on the lower end of such range.

Article X. General Installation Policies and Procedures.

(a) Timing of Installations. To minimize interference with the safe use, operation and maintenance of the freeway, and as reasonably necessary to manage the right-of-way, the City Engineer

may limit the timing of access so that, to the extent possible, there is no more than one **Telecommunications System** installation or repair project underway at any given time on any particular segment of a City Right of Way.

(b) Location and Alignment Criteria.

- 1) ***General Location Policy.*** *To minimize interference with the safe use, operation and maintenance of the City's streets, longitudinal installations of Telecommunications Systems and facilities shall be located outside the Traveled Way and as near to the outer edge of the right-of-way line as is reasonably practical; provided, however, that alternative locations within the right-of-way, including the Traveled Way, may be permitted where the City Engineer determines that it is not reasonably practical to locate the Telecommunications Systems and facilities along the outer edge of the right-of-way and that the use of the alternative location is consistent with the City's goal to minimize interference with the safe use, operation and maintenance of the streets and highways.*
- 2) ***Horizontal and Vertical Clearance Zones.*** *As a general rule, subsequent installations of underground Telecommunications Systems and facilities outside the Traveled Way shall be located not less than two feet (2') from any previously installed Telecommunications System or other utility installation, if any, within the City's right-of-way or such greater clearance zones required by utility codes as they relate to electrical, water, gas or sewer systems. Exceptions may be considered on a case-by-case basis and as may be reasonably necessary to manage the City's right-of-way and where the City Engineer determines that it is not reasonably practical to locate the Telecommunications Systems as herein provided.*
- 3) ***Depth.*** *All underground Telecommunications Systems and facilities shall be located and installed in accordance with a minimum depth of thirty-six inches for fiber optic facilities and twenty-four inches (24") for all other facilities (such as*

copper facilities), or at such greater depths as the City Engineer may require as a special condition of a Right of Way Agreement or as shall be necessary to comply with the Horizontal and Vertical Clearance Zone requirement. Exceptions may be considered on a case-by-case basis and as may be reasonably necessary to manage the City's right-of-way and where the City Engineer determines that it is not reasonably practical to locate the Telecommunications Systems as herein provided.

- 4) Access Points. In all future installations, devices for accessing underground Telecommunications Systems and facilities for routine service or site visits shall not be allowed within the Traveled Way, except where the City Engineer determines that it is not reasonably practical to locate such systems outside the Traveled Way. Existing access points within the Traveled Way shall be permitted to exist as long as such access points do not create a hazard for the traveling public.*
- 5) Support Facilities. All above-ground support facilities for underground Telecommunications Systems and facilities shall be located outside the Traveled Way and as near to the outer edge of the right-of-way line as is reasonably practical. No above-ground facility may be located on the Traveled Way without the express written approval of the City Engineer.*
- 6) Attachment to Roadway and Roadside Structures. The attachment of Telecommunications Systems and facilities to Roadway and Roadside Structures -- including without limitation bridges, overpasses, underpasses, culverts and tunnels -- shall be permitted only with the prior written approval of the City Engineer.*

Article XI. Installation and Maintenance Requirements.

(a) General Standards of Care.

- 1) The telecommunications company shall take care not to install any Telecommunications System in such a manner as to create a potential hazard to life, health or property or in such a manner as to impair the use, operation and maintenance of the City's rights of way.*

- 2) *The telecommunications company shall cooperate with the City Engineer to identify locations for its Telecommunications System or facilities within the City's right-of-way that will, to the extent it is reasonably practical, minimize any potential conflict with the future expansion or reconstruction of the right-of-way. The telecommunications company shall also take care to install all Telecommunications Systems or facilities in such manner as to require only minimal maintenance within the City's right-of-way after installation.*

(b) Tennessee One-Call Service. Telecommunications companies, utilities and private entities accessing the City's rights of way shall comply with the Tennessee One-Call Service as provided in Section 65-31-101, et seq. of the Tennessee Code, or as it may be amended.

(c) Permits and Approvals. The telecommunications company shall be responsible for obtaining all approvals and/or permits that may be required for activities authorized under this Rule, including without limitation all environmental permits and federal regulatory approvals or permits, if applicable.

Article XII. Minimum Installation and Maintenance Controls.

The following minimum controls shall apply to the installation, servicing and maintenance of all Telecommunications System within City's rights-of-way, in addition to such other requirements as the City Engineer may provide as a general or special condition of the Right of Way Agreement:

(a) Installation and Maintenance Plan. Before commencing any installation, servicing or maintenance of a Telecommunications System, the telecommunications company shall submit an installation and maintenance plan to the City Engineer for review and approval within fourteen (14)

days, and upon approval such plan shall be made a part of the Right of Way Agreement. At a minimum, the installation and maintenance plan shall specify:

- 1) *The location and method of installing each part of the Telecommunications Systems and facilities within the right-of-way;*
- 2) *The means by which access to and within the right-of-way shall be accomplished for the purpose of installing, servicing and maintaining each part of the Telecommunications Systems and facilities, including provisions for ingress and egress, parking of vehicles and equipment, and storage of materials;*
- 3) *The means by which the telecommunications company will provide for the control of traffic on the Traveled Way, if needed, in the course of installing, servicing or maintaining any part of the Telecommunications Systems and facilities;*
- 4) *The schedule for completing the installation of the Telecommunications Systems and facilities, or parts thereof, within the right-of-way.*

(b) Preservation of Pavement Structure. Open cutting or trenching of the pavement structure of a street, highway or roadway, including without limitation the Traveled Way and shoulders, if any, shall not be permitted. Wherever the City Engineer permits a crossing of the pavement structure of a street, highway or roadway in accordance with this Ordinance, the crossing shall be accomplished by boring or other untrenched method as approved by the City Engineer. Open cutting or trenching of the pavement structure of a street, highway or roadway may be permitted in special circumstances where there is no reasonably practical alternative means of access and the telecommunications company has made adequate provisions for controlling access to the work zone, directing traffic, and protecting the safety of workers and the traveling public, as specified in the installation and maintenance plan approved by the City Engineer.

(c) Access to Right-of-Way for Installation and Maintenance.

- 1) *As far as it is reasonably practical, all Telecommunications Systems should be designed and located in such a manner that they can be installed, serviced and maintained without direct access thereto from the Traveled Way. Such direct access may be permitted in special circumstances where there is no reasonably practical alternative means of access and the telecommunications company has made adequate provisions for controlling access to the work zone, directing traffic, and protecting the safety of workers and the traveling public, as specified in the installation and maintenance plan approved by the City Engineer.*

(d) Parking of Vehicles. The telecommunications company shall not be permitted to park vehicles and equipment or to store materials on the City's right-of-way without express prior approval by the City Engineer, except as may be required during actual installation and repair operations and while all required traffic controls are present and in place.

(e) Traffic Control.

- 1) *All traffic control signs or other traffic control devices that the telecommunications company may use in the course of any installation, servicing or maintenance of a Telecommunications Systems shall comply with the provisions of the Manual on Uniform Traffic Control Devices, Tennessee Code Annotated § 55-8-153 and City Code §§36-41 and 36-42.*
- 2) *If any installation, servicing or maintenance project is anticipated to significantly impede the flow of traffic on a divided street or roadway or on a major thoroughfare, the telecommunications company shall arrange for law enforcement officers having appropriate enforcement authority to be present to ensure the safe flow of traffic or as may be reasonably required in the installation and maintenance plan approved by the City*

Engineer where access to the work zone has been permitted from the Traveled way or areas appurtenant to the Traveled Way, except as the City Engineer may otherwise expressly permit or require where the City Engineer determines that it is not reasonably practical for Grantee to comply with this requirement. In any event, except in emergency situations the telecommunications company may not conduct any such work within the Traveled Way without giving specific advance notice thereof to the City Engineer, in the manner and at the times required by this Ordinance.

- 3) *Advance Notice of Installation or Maintenance Work. Before performing any non-emergency servicing or maintenance of a Telecommunications System at any location within Traveled way or areas appurtenant to the Traveled Way the telecommunications company shall give at least two (2) work days advance written or facsimile notice thereof to the City Engineer, if timing of such work deviates from the plan in the approved permit. Advanced notice shall not be required for work associated with routine customer trouble reports of 2 hours or less. City Engineer may waive the advance notice requirement,*

(f) **Emergency Maintenance or Repair.** Compliance with the advance notice requirements of subsection (e) of this Article is not required of any person responsible for emergency excavation or demolition, for repair or restoration of service or to ameliorate an imminent danger to life, health, or property; provided, that such person gives the City Engineer as soon as practicable, and written or facsimile notice thereof not less than forty-eight (48) hours after the occurrence of an event requiring emergency maintenance or repair of a Telecommunications System within the City's right-of-way if such facilities have not been restored in its original location. City shall provide prior notice, if possible, to Grantee if it must move its Telecommunications Systems due to an emergency and allow Grantee the opportunity to move such Telecommunications Systems. If this is not possible, City will contact Grantee as soon as is practicable and inform Grantee of any actions taken by City to the Telecommunications System.

(g) **Cessation of Work for Public Safety.** If the telecommunications company fails to comply with the traffic control plan or any other provision of the installation and maintenance plan, or if any activity of the telecommunications company within the City's right-of-way interferes with the safe

and efficient use of the Travelled Way as determined by the City Engineer, the telecommunications company shall immediately cease such activity upon notice being given by the City Engineer, and the telecommunications company shall thereafter work with the City Engineer to bring its activities into compliance with the installation and maintenance plan and/or implement such additional safety requirements as may be specified by the City Engineer.

(h) Trees. With regard to new installations only, cutting or removal of trees along the City's rights-of-way shall not be permitted without the express approval of the City Engineer.

Hazardous Substances. The telecommunications company shall not place, install or deposit any hazardous substance or hazardous waste within or on any part of the state freeway or state freeway right-of-way. If at any time the telecommunications company causes or allows a spill of a hazardous waste or substance within the freeway right-of-way, the telecommunications company shall remain solely liable for the clean-up and removal of such hazardous waste or substance. The telecommunications company shall indemnify the City of Memphis and the City Engineer, and their officers, employees and agents, and shall hold them harmless against any and all claims or expenses of any kind related to the deposit, spillage and/or clean-up of any such hazardous wastes or substances.

(i) Repair and Restoration of Premises.

- 1) *The telecommunications company shall, as directed by and in a manner satisfactory to the City Engineer, promptly replace or repair any portion of the pavement, shoulders, structures, ramps, guardrail, drainage, or any other part of the freeway that may have been damaged in the course of any work within the City's right-of-way.*

- 2) *Upon the completion of any installation, replacement, repair or relocation of Telecommunications System within the City's rights-of-way, the telecommunications company shall promptly restore the premises to a condition similar to that which existed prior to such work, in a manner satisfactory to the City Engineer.*
- 3) *The telecommunications company shall remain responsible for maintaining any excavation or trench on or along any City right-of-way, as directed by and in a manner satisfactory to the City Engineer.*

(j) As-Built Drawings. “As-built” drawings that adequately demonstrate the location, size length and nature of all underground and aboveground Telecommunications Systems located on, over or under the City’s right-of-way shall be submitted by a Telecommunications Company to the City Engineer within one hundred twenty (120) days after completion of construction of such systems, if drawings are not submitted pursuant to Article XII(a). Such drawing shall be in .pdf or other accepted industry format as reasonable to the size and scale of the project. Where the system is installed in duct, conduit or on poles owned by another entity, the owner shall be identified and the overall length, size, and shape of system installed in the shared facilities shall be indicated. A Telecommunications Company shall update such drawings within sixty (60) days whenever material changes are made to such company’s system which impact the public right-of-way. If so marked, all drawings and plans shall be treated as confidential and proprietary as applicable to the extent allowed by applicable law, but even if such drawings and maps are not protected from public disclosure by applicable law, the City shall not post such documents or maps on City websites.

(k) Completion of any installation or relocation. It shall be the responsibility of the Telecommunications Company to seasonably submit “as built” drawings of its facilities in the City’s right-of-way and to provide other information upon request.

(l) Above ground markers. Telecommunications companies may install above ground markers to indicate the location of their facilities as long as such markers do create a hazard for the traveling public and are ADA passable.

Article XIII. Compliance and Revocation.

(a) In the event that the City Engineer determines that the telecommunications company is in violation of any material provision of this Ordinance or any Right of Way Agreement, the City Engineer may order the telecommunications company to comply.

(b) In any case not presenting any imminent threat to public safety, as determined by the City Engineer, the telecommunications company shall be given thirty (30) days, or such other reasonable time as the City Engineer may provide, within which to correct the noncompliance.

(c) In any case presenting an imminent threat to public safety, as determined by the City Engineer, the telecommunications company shall correct the noncompliance promptly as reasonably directed by the City Engineer.

(d) If a Telecommunications Company fails to comply with any order or directive given by the City Engineer or otherwise violates any provision of this Ordinance, after the above-stated notice and opportunity to cure, then the City may take any action authorized by law, withholding of all other licenses and permits until the violation is cured, or repeal of any permit or Authorization previously granted or filing a suit in court to compel compliance. If, in any such proceeding, default is finally established, the Telecommunications Company shall be required to pay to the City the reasonable expenses incurred in the prosecution of such suit and all the City's damages and costs (including attorneys' fees). A Telecommunications Company that in good faith disputes a finding that it is in default, and that promptly files a court proceeding challenging the determination may continue to provide service pursuant to the terms of any permit or Authorization unless otherwise ordered by the court.

(e) A violation of the provisions of this Article after the above-stated notice and opportunity to cure shall subject the offending Telecommunications Company to an initial fine of \$50. Each day of

continued violation of this Ordinance constitutes a separate offense and will subject the offending Telecommunications Company to continuing fines, above the initial fine, of \$50 per day for each day that the a Telecommunications Company fails to comply with any order or directive given by the City Engineer to comply with any provision of this Ordinance.

(f) The telecommunications company shall not be entitled to any compensation, lost profits, consequential damages or reimbursement of suit expenses or attorney's fees in the event of a revocation of a Right of Way Agreement or enforcement action taken by the City to enforce this Ordinance.

Article XIV. RIGHT OF WAY FUND

(a) There is hereby created a right-of-way fund, which shall be used exclusively to help defray the costs associated with the acquisition, management, maintenance and policing of the City's rights of way, including but not limited to the costs of preparing studies of the right-of-way and costs of any special committee and the costs of staff and other reasonable expenses necessary to administer the provisions of this Ordinance.

(b) All payments for the use of the right-of-way made pursuant to this Ordinance shall be deposited into the fund, less reasonable administrative costs incurred by the City in connection with the collection of fees owed.

(c) Operating transfers shall be made from this fund to other funds of the City incurring costs associated with Right of Way management. Such operating transfers will be established in accordance with the City's annual Appropriation Ordinances, adopted from time to time.

Article XV. SEVERABILITY

If any section, subsection, sentence, clause, phrase, term, provision, condition, covenant or portion of this Authorization ordinance is for any reason held invalid or unenforceable by any court of competent jurisdiction, the remainder of this Authorization ordinance shall not be affected thereby, but shall be deemed as a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions hereof, and each remaining section, subsection, sentence, clause, phrase, term, provision, condition, covenant and portion of this Authorization ordinance shall be valid and enforceable to the fullest extent permitted by law.

Article XVI. EFFECT ON PRIOR ORDINANCES AND AGREEMENTS

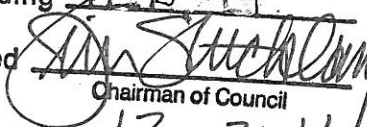
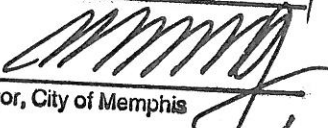
Any telecommunications company or utility owner shall be permitted to continue to occupy the City's streets and rights of way pursuant to any unexpired Specific Route or Encroachment Agreement as long as any such company is not in default thereunder; otherwise the standard Specific Route or Encroachment rates are hereby repealed and may not be used in any Specific Route or Encroachment Agreement after the adoption of this Ordinance. This Ordinance shall supercede and replace any unexpired Franchise Agreement granted pursuant to City Ordinance Nos. 4404 and 4980 governing access and construction activities within the City's Public Rights of Way by Telecommunications Companies (non-Resellers' Ordinances). City Ordinance Nos. 4404 and 4980 are hereby repealed to the extent inconsistent with this Ordinance. All future Right of Way Compensation and use of the City's Rights of Way by Telecommunications Companies shall be determined in accordance with this Ordinance.

Article XVII. ENACTMENT CLAUSE

Be it ordained, that this ordinance shall take effect from and after the date it shall have been passed by the Council, signed by the chairman of the council, certified and delivered to the office of the Mayor in writing by the comptroller, and become effective as otherwise provided by law.

SPONSOR: Councilman Reid Hedgepeth
Chairman

JIM STRICKLAND
CHAIRMAN
MEMPHIS CITY COUNCIL

THE FOREGOING ORDINANCE
5551 PASSED
1st Reading 5-20-14
2nd Reading 6-3-14
3rd Reading 11-18-14
Approved: 
Chairman of Council
Date Signed: 12-2-14
Approved: 
Mayor, City of Memphis
Date Signed: 12.2.14

I hereby certify that the foregoing is a true copy, and said document was adopted by the Council of the City of Memphis as above indicated and approved by the Mayor.

Valerie C. Squires
Comptroller